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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
vs.
BYRD J. BOONE,
Respondent.
No. 203.

## BRIEF OF RESPONDENT.

### ADDITIONAL STATEMENT OF THE CASE.

The shipment in question was of baggage from Jefferson City, Missouri, to Sedalia, Missouri, both points located in the central part of the state and not involving any special regulations applicable to border towns. Nothing was said to respondent at the time of purchasing her ticket as to any tariff or tariff provisions or any choice

of rates based on value, and that the transportation was wholly within the State of Missouri was admitted by petitioner (Rec., p. 18).

The baggage check introduced in evidence by petitioner (Rec., p. 33) is as follows:

> "Missouri Pacific Railroad Company, transported subject to tariff regulations, W. H. Bissland, Gen'l. Ag't. St. Louis, Mo., passenger's duplicate, from Jefferson City, Mo., to Sedalia, Mo., routed via Mo. Pac. R. R." At the bottom of it "Mo. Pac. R. R. Co. S-567-000,"

**and contained absolutely no notice of any limitation on the amount of liability.**

The petition upon which the case was tried alleged, among other things, "that in total disregard of its duty as a common carrier as aforesaid (defendant) failed and neglected to deliver said baggage at its destination to plaintiff, or to anyone for her, in as good condition as when received by it, but in disregard of its duty as aforesaid wrongfully delivered said trunk and its contents to one John H. Clark" (Rec., p. 3).

Under appropriate instructions (Rec., pp. 35 and 36) the jury found that the carrier had wrongfully delivered the trunk and rendered verdict in favor of the plaintiff (respondent) for one thousand sixty dollars ($1,060.00). The ground of appeal sought to be reviewed was the exclusion of testimony by the trial court. The testimony excluded was certain baggage tariffs consisting of the following:

First. Rules 10 and 11 of baggage tariff No. 25-2, alleged, **but not proven, to have been filed with the Interstate Commerce Commission** by the Director General October 1, 1919. Rule 10 provided that 150 pounds of baggage, not exceeding $100.00 in value, might be checked without additional charge (Rec., pp. 19-20). Rule 11 provided that unless a greater sum is declared by the passenger, and charges paid therefor, that the value shall be agreed to be not in excess of the amount specified in rule 10.

Second. Supplement No. 2 to tariff 25-2, alleged **but not proven to have been filed with the Interstate Commerce Commission by** the Director General February 29, 1920, containing rules 10 and 11 in substantially the same language (Rec., p. 22).

Third. The decision and order of the Public Service Commission of Missouri in case No. 2492, 9 P. S. C. Rep. 685 (Rec., pp. 24-25).

Fourth. Supplement No. 6 canceling baggage tariff No. 25-2, filed with Public Service Commission of Missouri, March 1, 1922. (The provisions of this supplement were not offered in evidence and it was filed two months after plaintiff's cause of action accrued) (Rec., p. 33).

To each and every one of these offers of proof objections were made on the ground that there was no proof that these tariffs had by any manner of publication or in any way been filed or in effect in Missouri at the time of the loss. Also for the reason that there was no showing

that the rates were in effect on intrastate movements or applied between the points in controversy (Rec., pp. 19, 21, 23, 24, 33).

There was no allegation nor proof that the rates and regulations at the time of the shipment constituted any burden direct or indirect upon interstate commerce or that the effect of the Missouri statutes was to create such a burden.

The opinion of the Court as to the admissibility of the evidence contains the following statement:

> "We are of the opinion, however, that if the testimony offered by defendant had been admitted it would not be relieved from liability to the extent claimed, under the conceded facts in this case, because as a part of the evidence adduced in behalf of plaintiff it was **stipulated and agreed** by the parties to this cause that, shortly after the arrival of the trunk at Sedalia, and while it was in defendant's possession, **they delivered it to one** John H. Clark, who was **not the owner**, and one to whom the defendant had no right or authority to deliver except by virtue of this duplicate check which Clark had in some way obtained."

## SUMMARY OF ARGUMENT, WITH POINTS AND AUTHORITIES RELIED ON.

I.

**Respondent's baggage was transported between two points, both centrally located in the State of Missouri, and did not pass through any other state and, therefore, the tariffs filed with the Interstate Commerce Commission did not apply for the following reasons:**

(a) The Interstate Commerce Act, as amended in 1920, limits its application to interstate and foreign commerce.

41 Stat. L. 474;
Minnesota Rate Cases, 230 U. S. 352.

(b) The Federal Control Act did not apply on January 3, 1922, the date of the happenings in question.

39 Stat. L. 645;
Proclamation of the President December 26, 1917;
41 Stat. L. 464.

(c) The Federal Control Act was merely a war measure and did not purport to control intrastate commerce beyond the period of the emergency.

Hines v. Burnett, 107 S. E. 657;
Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135.

(d) The Federal Transportation Act of 1920 authorizes states to regulate intrastate commerce.

41 Stat. L. 464;
Public Service Commission v. New York Central R. R. Co., 230 N. Y. 149.

(e) The Federal Control Act merely suspended the operation of state laws regulating intrastate commerce, and the provisions of the Federal Transportation Act of 1920 ipso facto restored state regulatory statutes.

41 Stat. L. 464;
Texas & Pacific Ry. Co. et al. v. Graham, 257 S. W. 642;
Lancaster et al., Receivers, v. Graham, 45 Sup. Ct. R. 225, Case 2;
Lancaster v. Smith, 262 S. W. 74;
Public Service Commission v. New York Cent. R. R., 230 N. Y. 149;
New York Cent. R. R. v. Public Service Commission, 268 Fed. 558;
Tua v. Carriere, 117 U. S. 201;
Butler v. Goreley, 146 U. S. 303;
R. S. Mo. 1919, Sec. 10449;
R. S. Mo. 1919, Sec. 9941.

II.

**This case involves transportation between centrally located points within a state and discrimination between intrastate and interstate commerce cannot be predicated because:**

(a) Any finding as to discrimination under the par-

ticular circumstances must be made by the Interstate Commerce Commission.

Houston & Texas R. R. Co. v. United States, 234 U. S. 342;
Lancaster v. McCarty, 267 U. S. 427;
Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 536;
Western & Atlantic R. R. v. Georgia Pub. Serv. Comm., 267 U. S. 493;
New York v United States, 257 U. S. 591;
Illinois Central R. R. Co. v. Public Utilities Com., 245 U. S. 493.

(b) While Congress by a specific law fixes the measure of liability in general for interstate transactions of carriers, it has left the liability for the carrying of a passenger's baggage to be regulated by the law of the state.

Western Union Telegraph Co. v. Esteve Bros., 256 U. S. 566;
Boston & Maine R. R. Co. v. Hooker, 233 U. S. 97;
Adams Express Co. v. Cronninger, 226 U. S. 491;
39 Stat. L. 441-2.

(c) It is not to be presumed that the state regulations constitute an unlawful burden on interstate commerce.

Bachtel v. Wilson, 204 U. S. 36;
M. K. & T. R. R. Co. v. Harris, 234 U. S. 412.

III.

**Since the judgment rests on an independent ground not involving a federal question and broad enough to maintain the judgment, the Supreme Court of the United States should not take jurisdiction.**

Hammond v. Johnston, 142 U. S. 73.

IV.

**The burden is on a carrier to establish a limitation of its liability.**

4 R. C. L., p. 920, Sec. 377;
McHaney v. Railroad, 149 Mo. App. 369;
R. S. Mo., Secs. 10438-10444;
9 P. S. Com. R. Mo. 692.

V.

**There can be no limitation of liability for a wrongful delivery or conversion of baggage, because:**

(a) Negligence on the part of the carrier is presumed unless explained.

Collins v. Ry. Co., 181 Mo. App. 213.

(b) A delivery to the wrong person is a conversion depriving the carrier of limitation of liability.

R. S. Mo. 1919, Sec. 9941;
Marshall & Michel Grain Co. v. K. C. F. S. & M. Ry. Co., 176 Mo. 480;

Peoples State Savings Bank v. Railroad, 192 Mo. App. 614;
10 C. J., pp. 183-4, Sec. 236;
10 C. J., pp. 262-263, Sec. 377;
Clarke-Lawrence v. C. & O. Ry. Co., 61 S. E. (W. Va.) 364, 366;
Central of Georgia Ry. Co. v. Chicago Portrait Co., 49 S. E. (Ga.) 727, 728;
4 R. C. L. 793.

## ARGUMENT.

### I.

### VALIDITY OF TARIFF REGULATIONS.

**The respondent's baggage was transported between two points both centrally located in the State of Missouri and did not pass through any other state and therefore the tariffs filed with the Interstate Commerce Commission did not apply for the following reasons:**

(A) The Interstate Commerce Act, as amended in 1920 (41 Stat. 474), specifically limits its application only to interstate and foreign commerce in the following language:

> "Sec. 400 * * *
>
> "(2) The provisions of this act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but **shall not apply—**
>
> > "(a) to the transportation of passengers or property or to the receiving, delivery, storage or handling of property **wholly within one state** and not shipped to or from a foreign country from or to any place in the United States * * *."

As to a similar provision in the act, as it stood in 1910,

this Court, in the Minnesota Rate Cases, 230 U. S. 352, at page 420, said:

> "Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and **intra**state rates; it did not set up a standard for **intra**state rates or prescribe or authorize the Commission to prescribe either maximum or minimum rates for **intra**state traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accumtomed authority of the states without the provision of a substitute."

(B) The Federal Control Act of August 29, 1916 (39 Stat. L. 645), applied only during the period ending February 29, 1920, or September 1, 1920, at the latest, and petitioner's railroad was not under federal control on January 3, 1922, the date of the happenings in question.

> 39 Stat. L. 645;
> Proclamation of the President, Dec. 26, 1917;
> 41 Stat. L. 464.

(C) The Federal Control Act was merely a war measure and did not purport to control intrastate commerce beyond the period of the emergency.

The case of Hines v. Burnett, 107 S. E. 657, cited by petitioner, arose during federal control and correctly

states the principles held by this Court in Northern Pacific Railway Co. v. North Dakota, 250 U. S. 135, as follows:

> "2. The Federal Control Act being an exercise of a complete, exclusive and necessarily paramount federal power (the war power) and its provisions for a complete change to federal control being clear and unambiguous, there can be no room for a presumption that state control over intrastate rates was to remain unchanged because it previously existed."

(D) The Federal Transportation Act of 1920 (41 Stat. L. 464) specifically returns to the states their powers to regulate rates within their borders when it provides that the fares, rates and charges of carriers who are subject to the Interstate Commerce Act shall continue "until changed by **state** or federal authority, **respectively**, or pursuant to authority of law."

> 41 Stat. L. 464.

Public Service Commission v. New York Central R. R. Co., 230 N. Y. 149, held (p. 153):

> "The time came when the necessity—the basis of the war power—ceased. The roads were to be returned to their owners, the states were once more to exercise their accustomed authority."

(E) The Federal Control Act merely suspended the operation of state laws regulating rates, fares and charges and, after all the provisions of the Federal Transporta-

tion Act of 1920 became effective, state regulatory statutes were ipso facto restored (41 Stat. L. 464).

In the case of Texas & Pacific Ry. Co. et al. v. Graham, 257 S. W. 642, a decision by the Texas Court of Civil Appeals, it was held (referring to the Federal Control Act):

> "It did not repeal the statutes of this state prohibiting railroads from limiting their common-law liability, but only superseded the operation of those statutes while said act was in force as a war measure and when Congress by the Transportation Act repealed this war measure the statutory laws of the states again became operative."

Reference to 45 U. S. Supreme Court Reporter, page 225, case 2 on that page, indicates that on January 12, 1925, a petition by the Receivers of the railroad for a writ of certiorari to this Court was denied in the Graham case; so that the opinion of the Texas Court is impliedly approved by this Court on the very question in issue here.

Likewise in the case of Lancaster v. Smith, 262 S. W. 74, it was held that no intention could be read in the Federal Transportation Act of February 28, 1920, to require state legislatures to re-enact their statutes regulating limitations of liability on intrastate shipments.

In the case of Public Service Commission v. N. Y. Central R. R. Co., 230 N. Y. 149, 129 N. E. 445, 14 A. L. R. 449, referring to the Federal Control Act, it was said by the New York Court of Appeals (230 N. Y., at p. 152):

"This action was not justified by any of the ordinary rules of law. It can be sustained solely as the exercise of the **war powers** of the United States. * * *

"That the Federal Control Act was a proper exercise of these powers; that as incident to the control of the railroads the question of fares, intra as well as interstate, was lodged exclusively in the President, has been held by the Supreme Court (Northern P. R. Co. v. North Dakota, 250 U. S. 135). The owners, however, did not lose their property. Their rights over it were suspended. And so as to the states."

See, also, page 154:

"As we have said, the obligation of the defendant to carry way passengers for 2 cents a mile has not been destroyed. It was temporarily suspended. It was always subject to this possibility under the war power if it became necessary. **But when the suspension ceases it revives with all its original force.**"

Circuit Judge Ward announces the same rule in the case of New York Central Railroad Company v. Public Service Commission, 268 Fed. 558, saying with respect to the Federal Transportation Act of 1920:

"Congress was legislating for 48 states, some of which we suppose had not fixed intrastate rates by legislation or by administrative commissions, and, therefore, it was provided that the change of the federal rates should be made by 'state authority' or 'pursuant to authority of law.' When a state law existed regulating the rates the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec.

> 3115¾a-3115¾p) did not repeal but merely suspended that law. Upon the termination of federal control the state law continues to control the rates *ex proprio vigore*. See the very analogous situation discussed in Tua v. Carriere, 117 U. S. 201 * * * and Butler v. Goreley, 146 U. S. 303 * * *. It seems to us incredible that Congress could have intended to require a state which had enacted such a law to express its intention to continue its established rates by enacting a new law in the same terms."

The cases to which reference is made in the above quotation, that is to say, Tua v. Carriere, 117 U. S. 201, and Butler v. Goreley, 146 U. S. 303, are cases which arose out of the repeal on September 1, 1878, of the Federal Bankruptcy Act, the cases holding that upon the repeal of the federal act, state laws which had been suspended during its operation were automatically revived.

It is submitted that Section 10,449, R. S. Mo. 1919 (printed in the appendix hereto), became on February 29, 1920, the authority of law under which rates, charges and regulations between points in the State of Missouri were to be governed. This section, to use the language of Mr. Justice Ward, "continues to control the rates ex proprio vigore," unless such rate or charge should be less than that previously established by the Director General, in which event the statute would not be revived of its own force until September 1, 1920. The loss of the baggage here in qustion did not occur until January 3, 1922, and hence was not within the Federal Control Act or the Transportation Act. Section 10,449, R. S. Mo. 1919,

as well as Section 9941, R. S. Mo. 1919 (see appendix) made the petitioner herein liable for the value of the baggage absent a showing of proper limitation under the terms of the Missouri statute.

Counsel for petitioner have practically conceded (Brief of Petitioner, p. 39) and they correctly concede that every case cited by them from this Court in opposition to the theories here presented may be distinguished from the case now before the Court because in those cases either the baggage was transported in interstate commerce or was transported during the period of Federal Control. With this concession petitioner retires to its last line of defense—the argument that the Missouri law constitutes a discrimination in favor of intrastate commerce and against interstate commerce.

## II.

## NO DISCRIMINATION.

**This case involves transportation not between towns near the border, but between points both located in the central part of Missouri, and there is nothing in this case upon which to predicate a discrimination between intrastate and interstate commerce, because:**

(A) Any finding as to discrimination under the particular circumstances must be made by the Interstate Commerce Commission.

No proof has been made by petitioner that the state statute and regulations constitute an undue burden upon

interstate commerce, nor has it been shown in this case, nor has petitioner offered to show that the Interstate Commerce Commission has ordered regulations and statutes of the State of Missouri nullified; but petitioner relies upon a number of cases as holding that where state rates interfere with interstate commerce the state rates must yield.

We point out, however, that in the case of Houston & Texas R. R. Co. v. United States, 234 U. S. 342 (the Shreveport case), Mr. Justice Hughes, speaking for this Court, said (p. 357):

> "Congress thus defined the scope of its regulation and provided that it was not to extend to purely **intra**state traffic. It did not undertake to authorize the Commission to prescribe **intra**state rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a **finding by the Commission of unjust discrimination** — **intra**state rates were left to be fixed by the carrier and subject to the authority of the states or of the agencies created by the states."

That case, the fundamental and leading one on this proposition, required an express finding by the Interstate Commerce Commission as was there present that an **undue discrimination** existed between the intrastate regulations and the interstate regulations. It was a case involving **border warfare** between Louisiana and Texas communities.

The decision in Lancaster v. McCarty, 267 U. S. 427, was likewise based upon a specific order of the Interstate Commerce Commission nullifying the state statute in the same **cross border dispute**. Chief Justice Taft said (pp. 431-2):

> "The Interstate Commerce Commission, therefore, had full authority to issue this order for the adoption of the Western Classification for intrastate points between Houston and Cisco, both in Texas. The conflict between the Revised Statutes of Texas and the **order of the Interstate Commerce Commission** can only be settled by recognition of the supremacy of the federal authority."

In connection with the latter case is to be noted that of Western & Atlantic R. R. v. Georgia Public Service Commission, 267 U. S. 493, decided within a month after the case of Lancaster v. McCarty, the opinion being written by the same Chief Justice. There a public service commission ordered a carrier to continue service upon an industrial spur track, this Court saying (p. 497):

> "The question whether the continuance of service on this industrial track violates the Interstate Commerce Act as **unduly discriminatory** is one that involves issues not primarily for the courts, but is for the Interstate Commerce Commission. It requires a consideration by experts of the benefit of the use of such a siding as compared with that of other sidings, in connection with the rates in interstate commerce, to determine whether there is undue discrimination between shippers. The railroad company is, there-

> fore, in no position to appeal to the courts on this ground until it has invoked the investigation and **decision of the Interstate Commerce Commission upon the concrete facts** in a proper manner."

When the case of Wisconsin R. R. Commission v. C. B. & Q. R. R. Co., 257 U. S. 563, at page 590, was decided, this Court announced:

> "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates **as a real discrimination** against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

In the case of New York v. United States, 257 U. S. 591, we have the following:

> "This case differs from the Wisconsin Rate Case just decided, ante 563, in that it is a direct proceeding to annul or set aside the order of the Interstate Commerce Commission complained of, brought against the United States and the Commission under the statute."

It is clear, therefore, that these cases cited by petitioner involving a specific order as to the specific rate in question are well within the doctrine announced in the Shreveport case. Again, in the case of Illinois Central Railroad

Co. v. Public Utilities Commission, 245 U. S. 493, Mr. Justice Van Devanter uses this language (p. 509):

> "To be effective in respect of intrastate rates established and maintained under state authority, an **order of the Commission** of the kind now under consideration must have a definite field of operation and not leave the territory or points to which it applies uncertain."

Also, at page 510:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested."

(B) While Congress may by a specific law fix the measure of liability for interstate transactions of carriers it has left the liability for the carrying of a passenger's baggage to be regulated by the law of the state.

In the case cited by petitioner of Western Union Telegraph Co. v. Esteve Bros. Co., 256 U. S. 566, the message was one between a point in United States and a point in France and hence clearly had nothing to do with intrastate business, and the Court was dealing with a specific act of Congress regulating the liability of telegraph companies when it held (p. 572):

> "Before the act the companies had a common law liability from which they might or might not extricate

> themselves according to the views of policy prevailing in the several states. Thereafter for all messages sent in **interstate or foreign commerce**, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before, a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed."

The case cannot possibly have anything to do with intrastate rates.

This Court in none of these cases held nor has it ever held that the states may not regulate intrastate commerce. On the contrary the holding in the Minnesota rate cases, 230 U. S. 352, was that the states alone could deal with transactions wholly within the state.

The case of Boston and Maine R. R. Co., 233 U. S. 97, does not militate against this conclusion. The character of that case is shown by the following quotation (p. 109):

> "It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station but was solely upon the contract of carriage in **interstate commerce.**"

Since the baggage there was shipped from a point in Massachusetts to a point in New Hampshire it is obvious

that section 20 of the Carmack amendment, as then existing, applied. As pointed out by this Court (233 U. S. at p. 110):

> "Since the decision in the Hughes case the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed and this Court has held that by virtue of that act (particularly section 20, the Carmack amendment) the subject of interstate transportation of property has been regulated by federal law to the exclusion of the powers of the state to control in such respect by their own policy of legislation."

Prior to the enactment of section 20 of the Carmack amendment the states had the right to decide on what limitations of liability should be allowed even in interstate shipments. As decided in the case, relied on by petitioner, Adams Express Co. v. Cronninger, 226 U. S. 491, at page 500:

> "But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state."

And again in the same decision, on page 504, we find this same doctrine expressed:

> "Prior to that amendment the rule of carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either

that of the general common law as declared by this Court and enforced in the federal courts throughout the United States (Hart v. Pennsylvania R. R. Co., 112 U. S. 331); or that determined by the supposed public policy of a particular state (Pennsylvania R. R. v. Hughes, 191 U. S. 477); or that prescribed by statute law of a particular state (Chicago etc. R. R. v. Solan, 169 U. S. 133)."

The Hocker case on the liability as to baggage turned on Section 20 or the Carmack Amendment as construed in the Cromninger case. In other words, the Carmack Amendment had enacted a uniform rule as to liability which must be followed by state courts as to interstate shipments.

But in 1916, after the decision in the Hooker case, Congress changed the Carmack amendment and inserted the following proviso:

"Provided, however, that the provisions hereof respecting liability for full actual loss, damage or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void **shall not apply**, first to baggage carried on passenger trains or both, or trains or both, carrying passengers * * * " (39 Stat. L. 441-2).

As to baggage, therefore, the Carmack Amendment does not provide the same degree of uniformity even in interstate shipments as is provided for other classes of freight, and the states are, therefore, at liberty to regulate

the liability as to baggage just as they did prior to the Carmack Amendment on all classes of freight.

(c) It is not to be presumed that the state regulations constitute an unlawful burden upon interstate commerce.

The statutes of Missouri in question here may or may not create a conflict or discrimination with rates established by the Interstate Commerce Commission because the rates within the state, and particularly between centrally located points in the state, may be such as to take care of unlimited liability as to baggage, and the evidence did not show any tariff provisions published as to those points.

The opinion, in Bachtel v. Wilson, 204 U. S. 36, states at page 40:

> "But we are not called upon to decide which is the correct interpretation. The Supreme Court of a state is the ultimate tribunal to determine the meaning of its local statutes. We are not to assume that that which seems more reasonable to us also seems more reasonable to and was adopted by it. Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was."

Also in the case of Missouri, Kansas & Texas R. R. Co. v. Harris, 234 U. S. 412, 419, this Court quotes with approval the language in Savage v. Jones, 225 U. S. 501, 533, as follows:

"When the question is whether a federal act overrides a state law the entire scheme of the statute must, of course, be considered and that which needs must be implied is of no less force than that which is expressed * * * but the intent to supersede the exercise by a state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state."

III.

**DECISION BASED ON INDEPENDENT GROUND.**

There was no showing in this case that the Missouri intrastate regulations in any way discriminated against interstate traffic, and, therefore, there was no federal question involved. If the decision can be maintained upon an independent ground not involving a federal question and broad enough to maintain the judgment, the Supreme Court of the United States should not take jurisdiction.

Hammond v. Johnson, 142 U. S. 73.

IV.

**BURDEN ON CARRIER.**

The burden was on the carrier in this case to establish a limitation of its liability, which it failed to do.

4 R. C. L., p. 920, Sec. 377;
McHaney v. Railroad, 149 Mo. App. 369.

The carrier likewise failed to establish either the Missouri or federal rate applicable to this shipment, although it should have done so in order to maintain a limitation upon its liability. The provisions of Sections 10438-10444, R. S. Mo. 1919 (see appendix), require that tariff rates, charges, rules and regulations in order to be effective on intrastate shipments in Missouri must be filed with the Public Service Commission in Missouri, and the most that was proved in this case was the authority to file same; but there **was no proof nor offer of proof to the effect that any such tariff or regulation was filed with the Public Service Commission of Missouri** (9 Public Service Commission Reports of Missouri 692, Orders 1, 3, 5, 11, 17). (See Rec., p. 31, where these orders appear in full.)

It is not charged in this case that there was any fraud on the part of the shipper or the carrier, and no agreement is alleged between them to secure a lower rate. The only defense made is that tariffs alleged but not proven to have been filed with the Interstate Commerce Commission were binding on the parties, and that the limitation of liability therein contained as to baggage is applicable between two points, both of which are located in the central part of Missouri, and in no way connected with border traffic. There was no showing, nor was there in the record an offer to show, that the tariff offered in evidence actually applied or purported to apply between these two points. The carrier, therefore, failed in this case to maintain its burden of proof to show a special limitation upon its common-law liability.

## V.

## THERE WAS CONVERSION.

Not only is there no federal question involved in this case, but the decision was for the right party in any event, because the tariffs alleged to have been filed with the Interstate Commerce Commission are inapplicable; the transit had ceased; and there was a wrongful delivery or conversion of the baggage, and to this extent the case was taken out of any Interstate Commerce Commission regulations.

(A) Negligence on the part of the carrier is presumed unless explained.

Collins v. Railway Co., 181 Mo. App. 213.

(B) This being an intrastate shipment, the court below was correct in ruling as it did that a delivery to the wrong person by the carrier is a conversion, and this is true even though the carrier offered to and did return the trunk after it had been recovered minus the contents. (See R. S. Mo. 1919, Sec. 9941 [printed in the appendix hereto], as well as the cases of Marshall & Michel Grain Co. v. K. C. F. S. & M. Ry. Co., 176 Mo. 480, and Peoples State Savings Bank v. Railroad, 192 Mo. App. 614.)

In 10 C. J., pages 183-184, section 236, it is stated:

"Limitations of the carriers' common-law liability contained in a contract of shipment have no applica-

tion where the goods are delivered to the wrong person."

In 10 C. J., pages 262 and 263, section 377, it is further said:

> "If the carrier delivers goods to a person not entitled to receive them, it is liable to the person who is entitled to them for conversion, rendering it immediately liable, regardless of a subsequent destruction of the goods by the act of God, and irrespective of its good faith in making the delivery. No question of care arises, for in such case the carrier acts at its peril and is liable regardless of negligence."

In 4 R. C. L. 793 the author states:

> "A delivery of the goods to the wrong person is an affirmative wrongful act, and the usual stipulation limiting the carrier's liability does not affect the shipper's right to recover their full value."

The case of Clarke-Lawrence v. C. & O. Ry. Co., 61 S. E. 364, is directly in point. In that case a carload of watermelons was shipped under a bill of lading containing, among other stipulations, a provision that in consideration of a **reduced rate** the liability of the carrier for loss or damage should be limited to one hundred dollars ($100.00). By a mistake on the part of the carrier's agent at destination the car was delivered to the wrong person; suit was brought for its value, and the carrier defended on the ground that in consideration of the reduced rate the liability had been limited to $100.00. The Court held that

the provision for limitation of liability had no application to a misdelivery of the property, and permitted the plaintiff to recover its full value. In disposing of the defense of a limitation of liability, the Court said (p. 366):

> "The stipulation for a limited liability has no application here. A wrongful delivery was not anticipated by the parties and cannot, therefore, be within the stipulation. Both the shipper and the carrier contemplated carriage of the goods to the place of destination, and delivery thereof to the consignee in good order and condition, provided they should not be lost or injured in transit by some accident or adventitious cause. As such loss or damage only was within the contemplation of the parties, the stipulation was clearly not intended to have any application in the case of a delivery to the wrong person. Affirmative wrongful acts are not within the limitation (Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Chicago etc. Ry. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43; Hutch, Car., Sec. 478)."

The reasoning in the above quotation from the opinion of the Supreme Court of West Virginia applies directly to the facts of this case. These tariff provisions are intended only as a protection to the carrier in the event of loss or damage due to accident in transportation. The tariff rule offered in evidence in our case (R. 21 and 22) expressly limits its application to cases of loss or damage as follows:

> "And the carriers issuing and participating in this tariff will not accept claim for a greater sum **in case of loss or damage.**"

This rule does not say that claim will not be accepted in the event of conversion, embezzlement, misdelivery, or other wrongful act or misconduct on the carrier's part, but **only** limits the liability in the event of **loss in transit or damage in transit**, and it was plainly the intention of the publishers of the rule to limit their liability only in the event of accidents happening in the **transportation** of the goods. It was not intended by this tariff provision that there should be any limitation upon the carrier's liability in the event of its affirmative wrongdoing, and to so hold would permit a carrier to intentionally steal shipments of great value and, by invoking the provision limiting liability, thereby profit by its own wrong. There is no such intention expressed in the tariff rule, and, if such an intention were expressed therein, it would be contrary to public policy and void.

In Central of Georgia Railway Company v. Chicago Portrait Co., 49 S. E. 727, the Supreme Court of Georgia, in holding that a carrier cannot limit its liability for its own wrong, said (l. c. 728):

> "In an action of trover or damages for conversion the tort-feasor could not take advantage of his own wrong, nor lessen the measure of his liability by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

Assuming, therefore, for argument only, that the tariffs offered in evidence in this case were lawfully in effect and applied to intrastate movements in Missouri, which we

deny, we submit for the above reasons and on the authority of the cases above cited that these tariff rules had no application to the facts of this case, wherein it appeared that by the wrongful act of the carrier plaintiff's property was converted and turned over to a stranger having no right or title thereto.

The St. Louis Court of Appeals in this case was right when it ruled (263 S. W. 495, at 496):

> "(2) A carrier cannot be guilty of conversion, which in law amounts to an abandonment of the contract, and at the same time hold the shipper to the terms of a contract which it has repudiated. We cannot construe the provision of the shipping contract fixing the liability of the carrier based upon a stated value to extend to a case of conversion such as this (St. Louis etc. R. Co. v. Wallace [Tex. Civ. App.], 176 S. W. 764; Merchants' etc. Transportation Co. v. Moore, 124 Ga. 482; Clarke-Lawrence v. C. & O. Ry. Co., 61 S. W. [W. Va.] 364; 4 R. C. L. 793)."

We submit, therefore, that the judgment of the St. Louis Court of Appeals is not in conflict with nor repugnant to any holding of this Court in the cases to which petitioner refers. There can be no estoppel, because there was no agreement between the parties, nor was the value misrepresented to secure a lower rate. The Interstate Commerce Commission rates cannot apply to a shipment between points in Missouri, and the state statutes and rates must govern such shipments unless the Interstate Commerce Commission has specifically found an undue dis-

crimination or burden upon interstate commerce, and no such finding is alleged. The state courts alone had jurisdiction to determine the liability of the carrier between points in Missouri, because baggage is expressly excepted from the Interstate Commerce Law relating to limitations of liability, and the state court in this instance decided the case properly and for the right party without invoiving a federal question.

For these reasons we respectfully submit that the writ of certiorari should be quashed and the judgment of the St. Louis Court of Appeals should not be disturbed.

MORTON JOURDAN,
FRED L. ENGLISH,
Attorneys for Respondent.

# APPENDIX.

## STATUTES.

### Missouri Liability Statute.

**Sec. 10449. Liability for damage for property in transit.** Every common carrier and every railroad corporation and street railroad corporation shall, upon demand, issue either a receipt or bill of lading for all property delivered to it for transportation. **No contract, stipulation or clause in any receipt** or bill of lading **shall exempt or be held to exempt any common carrier,** railroad corporation or street railroad corporation **from any liability for loss, damage or injury caused by it** to property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such property. Every common carrier, railroad corporation and street railway corporation shall be liable for all loss, damage or injury to property caused by delay in transit due to negligence, while the same is being carried by it, but in any action to recover for damages sustained by delay in transit the burden of proof shall be upon the defendant to show that such delay was not due to negligence. Every common carrier and railroad corporation **shall be liable for loss, damage and injury to property carried as baggage** up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who **may** make a reasonable charge for the assumption of

such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws (Laws 1913, p. 578).

**Missouri Baggage Statute.**

**Sec. 9941. Baggage shall be checked—penalties.** All baggage, when taken for transportation, shall be checked, if there is a handle, loop or fixture, so that the same can be attached, and a duplicate thereof given to the passenger or person delivering the same; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and, further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare, the same shall be refunded; **and on producing such check, or if he have no check, on demanding his baggage, if it be not delivered to him, he shall recover the value thereof** (R. S. 1909, Sec. 3138).

**Missouri Public Service Commission Acts.**

Section 10438, Revised Statutes of Missouri, 1919, reads in part as follows:

> "**Sec. 10438. Tariff schedules publication.** Every common carrier shall file with the commission and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within this state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it. * * * "

Section 10444, Revised Statutes of Missouri 1919, as Amended Laws of Missouri 1921, page 583, reads in part as follows:

"**Sec. 10444. Transportation prohibited until publication of schedules—rates as fixed to be charged—passes.**—No common carrier subject to the provisions of this chapter shall after the taking effect of this chapter engage or participate in the transportation of passengers or property, **between points within this state**, until its schedules of rates, fares and charges **shall have been filed** and published in accordance with the provisions of this chapter. Any railroad corporation, or common carrier, which shall undertake to perform any service or furnish any product or commodity unless or until the rates, tolls, fares, charges, classifications and rules and regulations relating thereto, applicable to such service, product or commodity, have been filed with the Commission and published in accordance with the provisions of this act, shall forfeit to the state not less than one hundred dollars nor more than five hundred dollars. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."